Jaya Sudhir a/l Jayaram v Nautical Supreme Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-268–02 OF 2018
ROHANA YUSUF, HASNAH HASHIM AND RHODZARIAH BUJANG JJCA
9 AUGUST 2018

Civil Procedure — Action — Consolidation of actions — Application by appellant to consolidate actions — Whether there were commonality of facts and issues — Whether main purpose of consolidation achieved — Whether appellant should have filed counterclaim — Whether failure to file counterclaim insignificant — Whether practice directions applicable — Whether practice directions administrative in nature — Rules of Court 2012 O 4, O 15 & O 57

This was the appellant's appeal against the decision of the High Court in refusing the appellant's application for the consolidation of the two legal suits the appellant was involved in ie Suit 165 and Suit 544. The appellant was first sued by the respondent, and eight and a half months later the appellant filed another suit against the respondent. The learned High Court judge stated that the two suits were in fact cross-actions which could not be consolidated. The learned High Court judge refused the application for consolidation on what appeared to be on the primary ground that the appellant should have filed a counterclaim in Suit 544 instead, since the suit was filed eight and a half months earlier than his own suit ('the learned judge's finding'). The respondent submitted that O 4 of the Rules of Court 2012 ('the ROC') did not permit the transfer of cases as O 57 of the ROC was the specific provisions for it and fully supported the learned High Court judge's finding that the two actions being cross-claims could not be consolidated.

Held, allowing the appeal with costs of RM10,000:

(1) The learned judge's finding amounted to an indirect finding that there was in fact a commonality of facts and issues in these two actions. The court agreed that Suit 165 could have been filed as a counterclaim in Suit 544 and the fault for not doing so lay squarely on the appellant's shoulders. Nonetheless, given the clear commonality of the issues and facts in the two suits, the main purpose of consolidation as stated by the Federal Court in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244('Central Securities') had clearly been achieved (see paras 4 & 8).

(2) Given the clear satisfaction of the principle for consolidation as provided in O 4 of the ROC as well as the extremely important consideration of

whether there would be inconsistent judgments pronounced by two courts as stated by the Federal Court above, the failure to file the counterclaim was clearly overshadowed by these legal considerations. That failure was rendered even more insignificant by the use of the word 'may' in O 15 of the ROC which governed the filing of a counterclaim. As such, a defendant could not be forced to bring a counterclaim when sued for the law gave him an election (see paras 9–10).

(3) Order 57 of the ROC did not come into play as O 57 catered specifically for cases where, for instance, a case in Kuala Lumpur High Court would be more expediently heard in the Shah Alam High Court. In the present appeal, both cases were filed in the Kuala Lumpur High Court but in different divisions, could not stand in the way of the all-important consideration as stated in *Central Securities* for these different divisions were created to streamline the courts for a more expeditious and efficient disposal of cases but not to create an obstacle or a hindrance against genuinely deserving cases filed in different divisions. In addition, the importance of practice directions was purely administrative in nature and could not in itself override statutory rules of procedure for the court (see para 11).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap keputusan Mahkamah Tinggi yang tidak membenarkan permohonan perayu untuk penyatuan dua guaman yang melibatkan perayu iaitu Guaman No 165 dan Guaman No 544. Perayu pada mulanya di saman oleh responden, dan lapan bulan setengah kemudian, perayu memfailkan satu guaman lain terhadap responden. Hakim Mahkamah Tinggi yang bijaksana menyatakan bahawa guaman tersebut sebenarnya merupakan tindakan bersilang yang tidak boleh disatukan. Hakim Mahkamah Tinggi yang bijaksana tidak membenarkan permohonan penyatuan berdasarkan alasan utama iaitu perayu sepatutnya memfailkan tuntutan balas dalam Guaman No 544, memandangkan guaman tersebut difailkan lapan setengah bulan lebih awal daripada guamannya sendiri ('dapatan hakim terpelajar'). Responden berhujah bahawa A 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') tidak membenarkan pemindahan kes memandangkan A 57 KKM merupakan peruntukan spesifik untuk pindahan kes dan menyokong dapatan hakim Mahkamah Tinggi yang bijaksana yang kedua-dua guaman tersebut adalah tuntutan silang yang tidak boleh disatukan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Dapatan hakim merupakan dapatan tidak langsung yang menunjukan bahawa wujudnya fakta dan isu yang sama dalam kedua-dua tindakan. Mahkamah bersetuju bahawa Guaman 165 boleh difailkan sebagai tuntutan balas dalam Guaman 544 dan kegagalan untuk berbuat demikian terletak di bahu perayu. Namun, mengambil kira kewujudan

isu dan fakta yang sama yang jela dalam kedua-dua guaman, tujuan utama penyatuan seperti dinyatakan oleh Mahkamah Persekutuan dalam *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 ('Central Securities') telah tercapai (lihat perenggan 4 & 8).

(2) Mengambil kira prinsip penyatuan yang jelas dipatuhi seperti mana diperuntukkan di A 4 KKM dan juga mengambil kira pertimbangan penting sama ada akan wujud penghakiman yang tidak selari yang diisytiharkan oleh dua mahkamah seperti mana dinyatakan oleh Mahkamah Persekutuan di atas, kegagalan untuk memfailkan tuntutan balas ditenggelami oleh pertimbangan perundangan ini. Kegagalan tersebut turut menjadi tidak penting dengan penggunaan perkataan 'may' di A 15 KKM yang menentukan pemfailan tuntutan balas. Oleh itu, defendan tidak boleh dipaksa untuk memfailkan tuntutan balas kerana undang-undang telah memberikannya pilihan (lihat perenggan 9–10).

(3) Kaedah 57 KKM tidak diguna pakai kerana A 57 adalah secara spesifik diguna pakai dalam situasi yang mana, sekiranya kes yang didaftarkan di Mahkamah Tinggi Kuala Lumpur adalah lebih suai manfaat sekiranya didengar di Mahkamah Tinggi Shah Alam. Dalam rayuan ini, kedua-dua kes difailkan di Mahkamah Tinggi Kuala Lumpur, namun di bahagian yang berlainan, tidak boleh menghalang pertimbangan yang penting seperti dinyatakan dalam *Centeral Securities* kerana bahagian berlainan ini diwujudkan untuk memperkemaskan mahkamah untuk penyelesaian kes yang cepat dan cekap dan bukan untuk mewujudkan halangan terhadap kes-kes yang sewajarnya berhak untuk difailkan di bahagian yang berbeza. Tambahan, kepentingan arahan amalan hanyalah bersifat administratif dan tidak boleh mengatasi peraturan statutori untuk prosedur mahkamah (lihat perenggan 11).]

Notes

For cases on consolidation of actions, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 122–135.

Cases referred to

Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid [1979] 2 MLJ 244, FC (refd)

Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd [2002] 1 MLJ 385, FC (refd)

Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd And Ors [2010] MLJU 1854; [2010] 1 LNS 1677, HC (refd)

RHB Bank Berhad v SSB Consortium Berhad & Ors [2009] MLJU 28; [2009] 5 CLJ 76, HC (refd)

Selinsing Mining Sdn Bhd v Selinsing Gold Mine Manager Sdn Bhd & Ors [2017] 10 MLJ 97, HC (refd)

Sykt Multi Wood v Foosan Timber Industries Sdn Bhd & Anor [1992] 3 CLJ Rep 623, HC (refd)
Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] MLJU 233; [1998] 5 CLJ 794, HC (refd)

Legislation referred to

Bankruptcy Act 1967 (now Insolvency Act 1967)
Rules of Court 2012 O 4, O 4 r 1, O 15, O 15 r 2(1), O 57, O 57 r 1(1)

Appeal from: Suit No WA-22NCVC-544–08 of 2016 (High Court, Kuala Lumpur)

Gopal Sri Ram (Robert Low, Karen Yong and David Yii with him) (Ranjit Ooi & Robert Low) for the appellant.
Su Tiang Joo (KL Pang, Teh Eng Lay, ZT Chok and Nicholas Teh with him) (Cheah Teh & Su) for the respondent.

Rhodzariah Bujang JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] The appellant ('Jaya Sudhir') was aggrieved by the refusal of the High Court to consolidate two suits in which he was directly involved — as a defendant in Suit No WA-22NCVC-544–08 of 2016 ('Suit 544') and as a plaintiff in Suit No WA-22NCC-165–05 of 2017 ('Suit 165'). The legal disputes concerned a joint venture company, Nautilus Tug & Towage Sdn Bhd ('the joint venture company') which at the time of its incorporation was for the purpose of undertaking a continuation of a project by another entity, Vale. The joint venture company was owned by Azimuth Marine Sdn Bhd ('Azimuth') and Nautical Supreme Sdn Bhd ('Nautical') with Azimuth holding 80% shares and Nautical, the remaining 20%. This shareholding was provided for in a shareholders agreement dated 15 March 2013. Then on 16 December 2015, Azimuth transferred 10% of its shares in the joint venture company to Jaya Sudhir and the following year, Jaya Sudhir was appointed a director of the joint venture company. Nautical alleged that the said transfer by Azimuth was in breach of the shareholders agreement and sued Jaya Sudhir in Suit 544, contending, inter alia, that he had wrongfully procured the shares and/or had induced Azimuth to breach the said agreement. Jaya Sudhir subsequently filed Suit 165 contending that there was a collateral understanding between him, Nautical and Azimuth that he was the beneficial owner of 80% of the joint venture company's shares held in Azimuth's name, that he would be entitled to participate in the equity of the joint venture company with Nautical's consent and therefore no further consent was necessary to divest part of the Azimuth's 80% shares in the joint venture company to him. Why this consent was raised was because cl 9.1 of the shareholders agreement restricts the transfer of shares

in the joint venture company in the manner prescribed therein and consent is a pre-condition to such a transfer. The relevant provision of cl 9.1, ie sub-cll (a) and (c) are reproduced below:

Clause 9.1

(a) No Shareholder shall transfer shares held by it in the capital of the Company or otherwise sell, dispose or deal with all or any part of its interest in such shares otherwise than in accordance with the provisions of the Company's Articles of Association until and unless the rights of pre-emption conferred by this Clause have been exhausted.

(b) ...

(c) Every shareholder who desires to transfer any share or shares in the Company (for the purpose of this Clause 9.1 only, referred to as the Transferor') shall give to the Company a notice in writing of such desire ('Transfer Notice') Subject as hereinafter mentioned, a Transfer Notice shall constitute the Company as the Transferor's agent for the sale of the share of shares specified therein (the 'said shares'). Upon the Company's receipt of the Transfer Notice, the Directors shall offer the said Shares for sale, in one or more lots, at the discretion of the Directors, to the Shareholders other than the Transferor at the Prescribed Price.

[2] No such consent was obtained, said Nautical when Azimuth effected the transfer of its shares in the joint venture company to Jaya Sudhir. Jaya Sudhir on the other hand contended that one Dato' Seri Timor Shah Rafiq, a director of both Nautical and the joint venture company, had facilitated a breach of that collateral understanding and for which the said personality was sued by him as the first defendant in Suit 165, Nautical as the second defendant, Azimuth as the third defendant and the joint venture company as the fourth and final defendant.

[3] It has to be mentioned also that Nautical did serve a notice of arbitration to Azimuth and the joint venture company for breach of the shareholders agreement pursuant to cl 33 of the said agreement and that in Suit 165, Jaya Sudhir had also filed for an injunction to restrain the arbitration. This was allowed by Mohammed Zaini bin Mazlan J on 6 November 2017. A stay application filed by Dato' Seri Timor Shah Rafiq and Nautical against that decision was dismissed by the same judge. A consolidation application, the subject matter of this appeal, was filed by Jaya Sudhir soon after that dismissal and was heard before another High Court judge, Nordin Hassan J.

[4] The learned High Court judge refused the application for consolidation on what appears to be on the primary ground that Jaya Sudhir should have filed a counterclaim in Suit 544 instead, since the suit was filed eight and a half months earlier than his own suit. This to us amounts to an indirect finding by the learned High Court judge that there was in fact a commonality of facts and

A issues in these two actions. However, His Lordship considered that the filing of Suit 165 was an attempt to improve the pleadings in Suit 544 when Jaya Sudhir failed to file his counterclaim or initiate third party proceedings against the others whom he sued as co-defendants in this action/appeal. Further, said His Lordship, these two suits are in the nature of cross-actions and by the authority B of *Sykt Multi Wood v Foosan Timber Industries Sdn Bhd & Anor* [1992] 3 CLJ Rep 623 cross-actions cannot be consolidated, as held by Chong Siew Fai J (as His Lordship then was). His Lordship also alluded to the general practice of consolidating a later suit with the earlier one and not vice versa as in this case to avoid the perception of 'judge choosing', as described by RK Nathan J in C *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] MLJU 233; [1998] 5 CLJ 794 at p 796.

CONSOLIDATION

D

[5] Consolidation of actions is governed by O 4 r 1 of the Rules of Court 2012. The said provision reads:

> Where two or more *causes or matters are pending*, and if it appears to the Court that —
>
> E
>
> (a) some common question of law or fact arises in both or all of them;
>
> (b) the rights to relief claimed therein are in respect of or arise out of the same transaction or series of transactions; or
>
> (c) for some other reason it is desirable to make an order under this rule, the F court may order the *causes or matters to be consolidated* on such terms as it thinks just or may order the *causes or matters to be tried at the same time or one immediately after another* or may order any of the causes or matters to be stayed until after the determination of any other of the causes or matters. (Emphasis added.)

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[6] Other than the summary of the commonality of the two causes of actions as alluded to briefly above, Jaya Sudhir's counsel have in Annexure A to their written submission tabulated in greater details the common facts and issues in the two suits. This was really helpful in resolving this appeal in Jaya H Sudhir's favour but which we desisted from reproducing in this judgement given the clear commonality of the facts and issues mentioned earlier even from the brief summary of their respective causes of action.

[7] However, learned counsel for Nautical argued that this O 4 is only I applicable when the 'two or more causes or matters are pending' before the same High Court as this would be consistent with 'the due administration of justice while maintaining judicial harmony and avoiding chaos in litigation'. This approach, argued learned counsel further would be consistent with Practice Direction No 1 of 2008 on the assignment and distribution of cases

amongst the different divisions of the Kuala Lumpur High Court. For the record, Suit 165 was filed in the Commercial Division whereas Suit 544 was filed in the Civil Division. His other argument against the consolidation was that O 4 does not permit the transfer of cases as O 57 is the specific provision for it and fully supported the learned High Court judge's finding that the two actions being cross-claims could not be consolidated. He further contended that Jaya Sudhir's application was an abuse of the court process for circumventing the rules of pleading because he failed to file a counterclaim in Suit 544.

[8] We do not for a moment disagree that Suit 165 could have been filed as a counterclaim in Suit 544 and the fault for not doing so lies squarely on Jaya Sudhir's shoulders. Nonetheless, given the clear commonality of the issues and facts in two suits, the main purpose of consolidation as stated by the Federal Court in *Central Securities (Holdings) Bhd v Haron bin Mohamed Zaid* [1979] 2 MLJ 244 and raised by Jaya Sudhir's counsel before us has clearly been achieved. The Federal Court held at p 251 paras D–G as follows:

> the main purpose of consolidation is to save costs and time, and therefore it will not usually be ordered unless there is 'some common question of law or fact bearing sufficient importance in proportion to the rest' of the subject-matter of the actions 'to render it desirable that the whole should be disposed of at the same time' ...
>
> Now, the causes of action in this third party proceeding and Civil Suit No 2323 of 1976, where the plaintiffs and the defendants are the same, arise out of the same series of transactions, ie, purchase of United Holdings shares and short delivery of such shares, and in our view there are questions of fact or law common to them, eg, where rescission is a common element of relief, it is only necessary to prove that there is misrepresentation, innocent or fraudulent.
>
> We may add that in such circumstances, *one of the tests in deciding whether consolidation should be ordered is to determine whether two inconsistent judgements will come into existence if it is not ordered*. (Emphasis added.)

[9] The failure to file the counterclaim, given the clear satisfaction of the principle for consolidation as provided in O 4 as well as the extremely important consideration of whether there would be inconsistent judgments pronounced by two courts as stated by the Federal Court above, was clearly over-shadowed by these legal considerations.

[10] That failure is rendered even more insignificant by the use of the word 'may' in O 15 of the Rules of Court which governs the filing of a counterclaim. The said O 15 r 2(1) reads:

> Order 15 rule 2
>
> 2(1) Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) *may*, instead of bringing a separate action,

A make a counterclaim in respect of that matter; and *where he does so he shall add the counterclaim to his defence*. (Emphasis added.)

Thus, a defendant cannot be forced to bring a counterclaim when sued for the law gives him an election.

B

[11] As for the argument that only cases before the same High Court can be transferred, with respect we were unable to accede to the same. O 57 of the Rule of Court 2012 on transfer of proceedings does not come into play in the factual matrix of this case although it cannot be denied that the natural consequence of C the consolidation order when allowed would result in one case being transferred to the other court and heard by the same judge. Order 57 r 1(1) caters specifically for cases where, for instance, a case in the Kuala Lumpur High Court would be more expediently heard in the High Court in Shah Alam. In this appeal, both cases were filed in the High Court of Kuala Lumpur but in D different divisions, cannot stand in the way of the all important consideration as stated in *Central Securities* for these different divisions were created to streamline the courts for a more expeditious and efficient disposal of cases but not to create an obstacle or a hindrance against genuinely deserving cases filed in different divisions. In saying this, we were aware that Dato' Seri Timor Shah E Rafiq and Nautical did apply to transfer Suit 165 to the Civil Division but this was dismissed by Zaini J on 20 March 2018 after Nordin Hassan J's refusal to consolidate the two cases. The importance of Practice Directions as held by the Federal Court and submitted by Jaya Sudhir's counsels in *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385 F are purely administrative in nature and cannot in itself override statutory rules of procedure for the court.

[12] Before concluding, we must in fairness to Nautical's counsel, mention G that they have cited cases in support of their argument against the consolidation, but these we must state are High Court decisions which are not binding on us. Furthermore, the cited cases have rightly been distinguished in the oral submission of learned counsel for Jaya Sudhir before us as follows:

H (a) *RHB Bank Berhad v SSB Consortium Berhad & Ors* [2009] MLJU 28; [2009] 5 CLJ 76:

In this case Hishamuddin J set aside an order for leave pursuant to the Bankruptcy Act 1967 which he had made earlier on the basis that when His Lordship made the order, he was not sitting in a bankruptcy court, hence His Lordship had no jurisdiction over the bankruptcy file;

I (b) *Ng Joo Soon @ Nga Ju Soon v Devechem Holdings (M) Sdn Bhd And Ors* [2010] MLJU 1854; [2010] 1 LNS 1677:

The facts as reported shows that only parties in the two proceedings were the same but not the background facts; and

(c) *Selinsing Mining Sdn Bhd v Selinsing Gold Mine Manager Sdn Bhd & Ors* [2017] 10 MLJ 97:

In this case, the second and third defendants applied to transfer and consolidate a case in the Shah Alam High Court with that filed by the second and third defendants in Kuantan High Court and for an order that the Shah Alam Suit be heard after the Kuantan Suit.

[13] In conclusion, we have to reiterate that it would be unjust to both parties to allow their respective claims to go before two different judges whose decisions may conflict with each other, and this probable outcome must be avoided at all cost.

[14] For all the reasons stated above, we allowed the appeal with cost of RM10,000 here and below.

Appeal allowed with costs of RM10,000.

Reported by Izzat Fauzan